

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

CARDS NEO, LLC

Employer

and

Teamsters General Drivers & Helpers Local 823¹

Petitioner

Case 14-RC-266528

CORRECTED DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of drivers, mechanics and helpers/laborers² employed by the Employer at its Fairland, Oklahoma facility. The unit sought by the Petitioner includes approximately 25 employees comprised of 14 drivers, one mechanic, and 10 helpers.³

The Employer contends that the helpers should be excluded from the petitioned-for unit due to their certain and imminent displacement after the election and elimination of the helper classification. In this regard, the Employer asserts there is definitive evidence of a contracting unit resulting from a fundamental change in the nature of its business to demonstrate that the present work complement is not substantial and representative of the ultimate complement to be employed in the near future. Thus, the Employer argues it would not serve the purposes of the Act to direct an election at the Fairfield facility which include the helpers. Petitioner asserts that the Employer has failed to sufficiently demonstrate a fundamental change in its business operations has occurred such that a contraction of the unit is certain and imminent. Thus, Petitioner argues that the helpers should be included in the petitioned-for unit and permitted to vote because they meet payroll period eligibility requirements. The Employer also maintains that the helpers should be excluded from the petitioned-for unit because they do not share the requisite community of interest with the other petitioned-for employees in the unit. Finally, the

¹ Petitioner's name appears as amended by stipulation of the parties.

² Hereafter referred to as "helpers."

³ In its petition, Petitioner notes 13 employees employed as "sanitation workers and drivers" in the proposed unit. Although the petition was not formally amended, the employee list provided by the Employer in its statement of position lists 25 employees in the proposed unit including 14 drivers, 10 helpers and one mechanic – the Employer's list was not disputed by Petitioner. At the hearing and in its brief, without requesting to amend its employee list, Employer asserted there are approximately 30 employees in the proposed unit including 15 drivers, two mechanics and 12 helpers.

Employer contends that a manual election is appropriate and that it is possible to conduct a manual election safely notwithstanding the issues related to the COVID-19 pandemic.

A hearing officer of the Board held a video hearing in this matter. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). The parties were permitted to present their positions on the voting method and details of election at the hearing and by brief.⁴ I have carefully considered those positions and arguments. As explained below, based on the record⁵ and relevant Board law, I conclude that the helpers are eligible to vote as the Employer has not met its burden of establishing that its planned changes in the petitioned-for unit warrant their exclusion. I also find that the helpers share a sufficient community of interest with the other petitioned-for employees to constitute an appropriate voting group. Accordingly, I shall direct an election in the petitioned-for unit, as amended.⁶ Finally, I find that in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, an election by mail is appropriate.

I. FACTS

The Employer, a wholly owned subsidiary of CARDS Holdings, Inc., has provided residential, commercial and industrial waste services at its Fairland facility since about August 2020⁷ when it acquired the facility.⁸ Dan Christensen is the President of CARDS Holdings, Inc. and Operations Manager Ben London is the direct supervisor of the 25 petitioned-for employees at the Fairland facility. The record is silent as to the work location of Christensen and the reporting relationship between Christensen and London. The record is also silent as to other employees employed at the Fairland facility.⁹

The Employer's Fairland waste collection routes are performed by drivers and helpers via rear-load trucks. In this regard, from the time the Employer acquired its Fairland facility in August to date, the drivers and helpers have, for the most part, jointly run manual-load routes in which they manually load/unload waste to/from a rear-load truck.¹⁰ In the future, the Employer intends to transition from its manual-load route system to an automated one-person driver-only route system – this automated system will replace the manual-load system and will entail the driver exclusively loading/unloading waste via an automated truck.¹¹ With the implementation of the automated driver-only system, the Employer also plans to replace its current rear-load

⁴ Only the Employer, in its brief, addressed the issue of the mechanics of an election and how a manual election should and could be conducted in a safe manner.

⁵ The Employer filed a brief which I have duly considered.

⁶ The parties stipulated that an appropriate unit should include all drivers and mechanics and exclude professional employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

⁷ All dates are in 2020 unless otherwise stated.

⁸ The record is silent regarding details surrounding the Employer's acquisition of the Fairland facility.

⁹ The record references without detail the positions of welder and container delivery and the Employer's brief references the position of loader operator.

¹⁰ Currently, about three to four drivers perform one-person manual routes without helpers using a rear-load truck.

¹¹ The Employer contends that automated driver-only load system is more efficient and reduces Employer risk and liability as well as safer by reducing risk of employee injuries thereby improving career longevity.

manual collection trucks with automated side-load trucks capable of driver-only loading/unloading via automatic grabbers on the truck. There is no record evidence indicating that the Employer has laid off or displaced any helpers at the Fairland facility or has ordered or purchased any automated side-load trucks for the Fairland facility to date.¹² The Employer predicts that it is “unlikely” it will have any helpers at the Fairland facility employed in three months and “highly unlikely” in six months.

During a meeting held around the time of the acquisition in August and another meeting in about October, the Employer advised employees at the Fairland facility of its intent to transition to the automated driver-only route system in the future. At these meetings, the Employer also advised helpers regarding opportunities to apply and train for driver or other positions at the facility such as welder and container delivery. About two helpers have pursued the driver application process.

Before it acquired the Fairland facility, the Employer purchased approximately four other facilities at which drivers and helpers were employed. In about 2018, the Employer purchased The Trashman, LLC which became the Employer’s Northwest Arkansas (NWA) facility. In about 2019, the Employer purchased MSG Waste in Van Buren which became the West River Valley/Van Buren facility.¹³ In about December 2019 and Spring 2020, the Employer purchased RNS Trash Service and Best Trash Service, respectively – the record is silent regarding the name and location of these Employer facilities. Shortly after each acquisition, the Employer transitioned each of these four facilities from a manual-load route system with driver and helpers to an automated driver-only route system, let go of the helpers at each facility, and eliminated the helper classification. Additionally, the record demonstrates that the Employer currently operates driver-only automated routes and no longer employs helpers at its facilities located in Searcy, Little Rock, Foristell and Wentzville, Missouri.¹⁴ The only Employer facility currently employing helpers is the Employer’s Fairland facility herein.

As noted, under the current route system, the drivers and helpers work together to manually load and unload waste to and from rear-load trucks. Drivers are required to possess a commercial driver license (CDL) to operate the waste collection trucks. They are also subject to U.S. Department of Transportation regulations and must undergo mandatory fitness for duty and drug screening procedures. Although the record does not detail the helpers’ duties to a great extent, their primary duties appear to consist of manually loading and unloading the waste collection trucks. The helpers are not required to possess any special licenses, qualifications or certifications nor are they subject to any special regulations. While none of the helpers are qualified to perform driver duties, drivers frequently perform helper work on manual routes as needed. Mechanics working at the Fairland facility perform mechanical services for the waste collection trucks. They are required to be trained and certified in certain areas such as air brakes.

¹² Currently, about two drivers operate a semi-tractor-trailer to transport waste between the landfill and the transfer station and one driver operates a roll-off truck for large construction-type dumpster waste – these drivers have never used a helper to assist in their work. There is also record evidence that the Employer plans to change its rear-load hook up system for dumpsters which requires drivers to exit the truck to a front-load hook-up system so that the driver will not have to exit the truck to perform the hook-up. However, the record does not indicate the Employer has implemented the front hook-up system to date.

¹³ Although not in the record it appears that Van Buren is located in Arkansas.

¹⁴ Although not in the record it appears that Searcy is located in Arkansas and Foristell is located in Missouri.

Like the drivers, the mechanics also possess CDLs, however, the record does not demonstrate that any of the mechanics perform driving duties. The mechanics also do not perform any helper duties and the helpers or drivers do not perform any mechanic duties. The record is silent regarding the schedules worked by the drivers and helpers or whether the same drivers and helpers work together on the same routes on a consistent basis. The record is also silent as to the schedules worked by the mechanics. Drivers earn approximately \$16 per hour, helpers earn about \$11 per hour, and mechanics earn approximately \$16 to \$18 per hour.

II. ANALYSIS – APPROPRIATE UNIT

A. Board Law

In *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1256 (2001), the Board described its policy on expanding or contracting units as follows:

"To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be **substantial and representative of the ultimate complement to be employed in the near future**, projected both as to the number of employees and the number and kind of classifications." (emphasis added) (citing *Douglas Motors Corp.*, 128 NLRB 307, 308 (1960)).

The Board finds an existing complement of employees to be "substantial and representative" when approximately 30 percent of the eventual complement is employed in 50 percent of the anticipated job classifications. *Id.* at 1256 (citing *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000), relying on *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994)). The Board will also consider whether the contraction is a consequence of a "fundamental change in the nature of the Employer's business operations." *Id.* at 1256 (citing *Douglas Motors Corp.*, 128 NLRB at 308). Where the change is too speculative to warrant withholding from the employees their statutory right to choose or reject union representation, the Board will direct an election. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Unless an employer presents specific, detailed evidence in support of its position, "current employees should not be deprived of the right to select or reject a bargaining representative..." See, *Toto Industries, Inc.* 323 NLRB 645, 645 (1997). General statements by witnesses will not be sufficient.

When examining the appropriateness of a unit, the Board must determine not whether the unit sought is the only appropriate unit or the most appropriate unit, but rather whether it is "an appropriate unit." *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 1 (2010) (emphasis in original) (citing *Overnite Transportation Company*, 322 NLRB 723 (1996)). Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the unit sought by the petitioner. The Board next looks at whether the petitioned-for employees have shared interests. See, *Wheeling Island Gaming*, 355 NLRB at 637. Additionally, the Board analyzes "whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from that unit to warrant a separate bargaining unit." *PCC Structural*s, 365 NLRB No. 160, slip op. at 12 (2017) (emphasis in original). See, also, *The Boeing Company*, 368 NLRB No. 67 (September 9, 2019) in which the Board clarified *PCC Structural*s to, among other things, emphasize that the community-of-interest inquiry must

include examining whether employees excluded from the unit “have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.*, citing *PCC Structural*s, 365 NLRB at 11 (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). If those distinct interests do not outweigh the similarities, the unit is inappropriate and “the appropriate-unit analysis is at an end.” *PCC Structural*s, *Inc.*, 365 NLRB at 13. In making these determinations, the Board considers whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *Id.*; (citing *United Operations*, 338 NLRB 123 (2002)). The Board considers all of the factors together, as no single factor is controlling.

Regarding the eligibility of employees, standard Board eligibility rules require that an employee be in the appropriate unit on the established eligibility date and in employee status on the date of the election. *North General Hospital*, 314 NLRB 14, 15 (1994); *Farmers Rendering Co.*, 115 NLRB 1014, 1016 (1956).

B. Application of Board Law

There is record evidence of the Employer’s progress toward the goal of implementing a one-person driver-only automated route system and elimination of the helper classification. However, such implementation has not yet begun. While the Employer has advised employees at the Fairland facility regarding its plan to transition to an automated driver-only route system in the future, no dates have been provided, no route changes have taken place, no layoff notices have been provided, and no helpers have been displaced to date. The Employer merely predicts it is “unlikely” it will have any helpers employed in three months and “highly unlikely” in six months. The evidence is not definitive to demonstrate that contraction of the petitioned-for unit is imminent and certain or that a change in the helper workforce is certain or sufficiently proximate to exclude the helpers and warrant withholding from them their statutory right to choose or reject union representation.

The evidence is also not sufficient to demonstrate that the planned reductions in the helper workforce and elimination of the helper classification reflect a *fundamental change* in the nature of the Employer business operations. The Employer has not established that any aspect of its business or the nature of the work it performs is changing. Though fewer employees may be working on different newly acquired automated trucks, there is no evidence that the decreased unit will be performing work other than the collection of residential, commercial and industrial waste, i.e., the same work the employees performed before the planned reduction. The Employer relies on *Douglas Motors*, 128 NLRB at 308-309, to support its position that it has presented “evidence indicat[ing] with sufficient definiteness that a fundamental change in the nature of the Employer’s business operations is in process and expected to be accomplished by a date certain...[such that]...it would not be consistent with the provisions and policies of the Act to direct an immediate election which might result in the certification of a union not truly the choice of the employees of the new business operation.” In *Douglas Motors*, the petitioner proposed a unit of production and maintenance employees at a time when the employer was in the process of effectuating a program to eliminate all its production operations. In dismissing the petition, the

Board found sufficient evidence that a fundamental change in the nature of the employer's operations was in process and was expected to be effectuated in the near future. Specifically, the Board found that 75 percent of the employee complement as of the hearing date was eliminated and the employer's operations would be confined solely to distribution, warehouse and certain limited experimental functions. Here, the Employer has not effectuated any changes to date. Contrary to its argument on brief, the Employer has failed to offer definitive evidence that it has fundamentally changed its business operations in opting to transition to a different automated route system. Lacking this evidence, I find that the Employer's claim that its fundamental change in operations is imminent and certain, is, at best, speculative and does not establish that it will no longer use helpers in its new route system in the future. Thus, the Employer has not established that the contraction of the petitioned-for unit is a consequence of a fundamental change in its business operations.

Even if the implementation of a new route system was deemed to be a fundamental change in the nature of the Employer's business, I find in any event that the present work force constitutes a substantial and representative complement of the ultimate employee complement to be employed in the near future. In this regard, the work complement consisted of approximately 25 employees in three job classifications on the date of the hearing. The Employer plans to reduce the size of this unit to approximately 15 employees in two job classifications after the election. Thus, even if all 10 of the helpers are displaced as anticipated by the Employer, approximately 60 percent of the employees will remain in a majority of job classifications.¹⁵

In its pre-hearing statement of position, the Employer argued that the helpers should be excluded from the petitioned-for unit because they do not share a community of interest with the other employees, that is, the drivers and mechanics. The Employer presented some record evidence in support of this issue at the hearing, but it did not present any legal arguments at the hearing or in its brief to support its community-of-interest position.¹⁶ For the following reasons, I find that helpers at the Fairland facility share a sufficient community of interest with the other petitioned-for employees.

Primarily, I note that the record demonstrates there is interchangeability and contact among the helpers and drivers in that they share common routes and waste collection duties – they work together in loading and unloading waste to and from the trucks. See, *Executive Resource Associates*, 301 NLRB 400, 401 (1991), citing *Spring City Knitting Co. v. NLRB*, 647

¹⁵ The Employer's reliance on *NLRB v. Deutsche Post Global Mail Ltd.*, 315 F.3d 813 (7th Cir. 2003) in arguing in its brief that "[t]he drastic reduction of force combined with the operational change from manual to automated loading trucks establishes that the helpers should be excluded under the factors set in *Deutsche*," is misplaced. *Deutsche* did not address the type of change in business operations as contemplated here. Rather, the issue addressed in *Deutsche* was whether an immediate election is appropriate if the present workforce constitutes a substantial and representative complement of the employer's reasonably foreseeable future workforce *when a company has plans to relocate or expand*. *Id.* at 815-816. On a petition for enforcement of a Board order requiring the employer to recognize and bargain with union, the Court held that substantial evidence supported a determination that employer's existing workforce was a substantial and representative complement of its projected workforce justifying the underlying union election. *Id.* at 815-817.

¹⁶ The Employer specifically references in its brief that "the initial issue [of this case] is the removal of helpers in the petitioned-for unit because the helpers are members of a contracting unit and lack substantial and representative complement with other eligible voters." The only other issue referenced by the Employer in its brief is related to the mechanics of the election.

F.2d 1011, 1015 (9th Cir. 1081) (the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit). Next, I note the record evidence demonstrating that all of the petitioned-for employees are commonly supervised – this factor also weighs in favor of including the helpers in the petitioned-for unit as petitioned by Petitioner. See, *Executive Resources Associates*, 301 NLRB at 402; *NCR Corporation*, 236 NLRB 215 (1978) (in examining supervision, most important is the identity of employees’ supervisors who have the authority to hire, to fire or to discipline employees (or effectively recommend those actions) or to supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work providing guidance on a day-to-day basis). The record also reveals some, albeit limited, evidence of commonality in the skills and functions of the driver and helpers. Although none of the helpers are qualified to perform driver duties, drivers frequently perform helper work on routes as needed. Although the drivers are more qualified than helpers and focus on a different perspective (i.e., driving) of the Employer’s waste operations, they all perform waste collection duties at or out of the Fairland facility. See, *Phoenician*, 308 NLRB 826, 827-828 (1992) (where there is also evidence of similar terms and conditions of employment and some functional integration, evidence of similar skills and functions can lead to a conclusion that disputed employees must be in the same unit). The record further reveals that the petitioned-for employees bargaining unit are functionally related in that they are all involved in carrying out the Employer’s waste collection processes at its Fairland facility. See *Transerv Systems*, 311 NLRB 766 (1993) (evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists). Finally, although not significant, the record reveals that the petitioned-for employees share some common terms and conditions of employment in that they are all paid hourly. Based on the above factors, I conclude that the contact and interchangeability between the employees and commonality of skills and functions, common supervision, functional integration of the employees to the Employer’s waste operations, and some shared terms and conditions of employment among the petitioned-for employees weigh in favor of finding a shared community of interest such that the helpers are appropriately included in the petitioned-for unit.

Regarding the eligibility of employees, standard Board eligibility rules require that an employee be in the appropriate unit on the established eligibility date and in employee status on the date of the election. *North General Hospital*, 314 NLRB 14, 15 (1994); *Farmers Rendering Co.*, 115 NLRB 1014, 1016 (1956). Applying these decisions to the instant case, the fact that the helpers are predicted, or even scheduled, to be displaced after the election is not determinative on the issue of whether they are eligible to vote in this election. Accordingly, the helpers are eligible to vote in the election.

III. CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT

A. The Parties’ Positions

Petitioner asserts that a mail ballot election should be held given the current state of the COVID-19 pandemic in Oklahoma as well as in Fairland where the manual election would be held.

The Employer does not contend that COVID-19 is no longer an issue in the community but highlights the Board's general preference is for manual elections as providing the best opportunity for employees to exercise their right to vote. Without addressing the current state of the pandemic in Oklahoma and particularly in Fairland, the Employer argues that a manual election can be safely held in its facility and pose minimal risks to all individuals present. The Employer points out that since assuming its Fairland operations in August it has "sanitation procedures in place ensuring the safety of all personnel at its Fairland location" and it will abide by the procedures set forth in the July 6 General Counsel Memorandum 20-10, "Suggested Manual Election Protocols" (GC 20-10). Specifically, it would comply with:

- cleaning/sanitization of election site 24 hours prior to the voting period;¹⁷
- providing "ample space"¹⁸ at the voting site "to keep voting booths more than six feet apart;"
- releasing voters gradually to vote in order to accommodate social distancing;
- certifying 24 to 48 hours preceding that polling area is clean and the COVID status of individuals at each facility, including those who are COVID-positive or have had contact with a COVID-positive individual; awaiting COVID results; or exhibiting COVID symptoms;
- certifying COVID status at time of election by all party representatives, observers, and anyone seeking to participate in any election proceedings;
- 14-day post-election notification by parties of COVID status of any election participants.

The Employer also argues that the United States mail is not reliable.

B. Board Law, Agency Directives and Legal Authority

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB at 1144 (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). "It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* 325 NLRB at 1144 fn. 1;

¹⁷ In the event of a manual election, the Employer proposes a one-day election from 4:40 a.m. to 5:30 a.m.

¹⁸ The Employer provided a drawing of "polling place specifications" with areas at its Fairland facility consisting of 132, 228, 441, and 528 square feet.

National Van Lines 120 NLRB at 1346). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145.

The Board's longstanding policy is that elections should, as a general rule, be conducted manually; however, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.¹⁹ This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other "extraordinary circumstances." While there is a clear preference for conducting manual elections in ordinary circumstances, Board law indicates Regional Directors may use discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and Regional Directors should tailor the method of conducting an election to "enhance the opportunities for all to vote." Ibid.

The Board recognized the ongoing COVID-19 pandemic to constitute "extraordinary circumstances" and reaffirmed Regional Directors' discretion regarding election mechanics in its April 17 "COVID-19 Operational Status Update."²⁰ In pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

On November 9, the Board issued a decision in *Aspirus Keweenaw*, 370 NLRB No. 45, which set forth specific guidelines for determining whether to conduct a mail-ballot election or a mixed manual-mail ballot election due to the changing conditions caused by the Covid-19 pandemic. Specifically, the Board stated that if one or more of the following situations is present, the use of mail ballots under the extraordinary circumstances presented by the pandemic would be appropriate:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;

¹⁹ I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) ("the General Counsel's nonbinding Casehandling Manual"); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *San Diego Gas*, 325 NLRB at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

²⁰ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols; or
5. There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status.

Accordingly, I analyze the instant petition using the prevailing circumstances in the state and county where the facility is located.

C. A Mail Ballot Election Is Appropriate

COVID-19 has created a public health crisis, responsible for upwards of 237,000 deaths in this country.²¹ Currently, the number of new COVID-19 cases continues to climb with a total number of confirmed cases reaching over 9 million and the virus surging in several areas of the country.²² Unfortunately, Oklahoma is no exception. The United States as well as Oklahoma are currently in declared states of emergency due to COVID-19.²³ In assessing local conditions, I must consider the current state of the pandemic in Oklahoma, and particularly the Fairland area where the petitioned-for employees work. On May 29, Oklahoma went into Phase 3 of its three-phased “Open Up & Recover Safely (OURS) Plan,” with just 708 active COVID-19 cases out of nearly 4 million residents.²⁴ In contrast, there are currently 16,765 active cases according to the Oklahoma State Department of Health with the number of new infections spiking dramatically across the state.²⁵ The total number of cases since the state's first confirmed case in March has now reached 140,157.²⁶ The [Oklahoma State Department of Health](https://coronavirus.health.ok.gov/) reported 2,197 new coronavirus cases on November 9 and another 1,702 new cases on November 10. Over the past week, there was an average of 2,249 cases per day, constituting an increase of 69 percent over the preceding two weeks.²⁷ According to Johns Hopkins’ Coronavirus Resource Center Testing Tracker, this puts Oklahoma’s positivity rate for the prior 14-day period at 14.7 percent. Additionally, according to the latest [Executive Order report](#) released November 3, 1,026 Oklahomans were hospitalized, with 349 of those in intensive care – this is the first time Oklahoma reported more than 1,000 current hospitalizations.²⁸ Oklahoma health officials warn

²¹ https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (accessed November 10); <https://coronavirus.health.ok.gov/> (accessed November 10).

²² *Id.*

²³ On October 23, Oklahoma Governor Kevin Stitt issued a Sixth Amended Executive Order 2020-20, extending the state of emergency related to COVID-19 which has been in place since March 15. See, https://www.governor.ok.gov/articles/press_releases/gov-stitt-issues-amended-eo-extends-state-of-emerg (accessed November 10).

²⁴ https://www.governor.ok.gov/articles/press_releases/oklahoma-to-begin-phase-3-of-open-up-and-recover (accessed November 10).

²⁵ <https://coronavirus.health.ok.gov/> (accessed November 10).

²⁶ *Id.*

²⁷ <https://www.nytimes.com/interactive/2020/us/oklahoma-coronavirus-cases.html> (accessed November 10).

²⁸ The executive order report of the Oklahoma State Department of Health which [can be found here](#) includes the latest hospitalization numbers and shows 1,055 record-high hospitalizations as of November 5 .

that unless prevention protocols are not widely implemented, the number of COVID-19 hospitalizations in Oklahoma is projected to triple.²⁹ The Institute for Health Metrics and Evaluation projects that by December 9, Oklahoma will average over 5,600 coronavirus cases per day and by December 28, there will be 2,815 Oklahomans hospitalized with COVID-19.³⁰

The Employer's Fairland facility is located in Ottawa County. Notably, the Employer does not address coronavirus statistics and numbers in this county where the election is to take place, which has not been spared from COVID-19, having recently experienced an uptick in positive cases and where coronavirus cases continue to grow.³¹ As of April 17, the date of the Board's Operational Status Update, the number of cumulative coronavirus cases in Ottawa County was 24; as of November 9 it is 1,391 and climbing.³² Out of 21 deaths in Ottawa County since the beginning of the pandemic, 17 have occurred after September 25, with nine deaths from October 28 to November 3.³³ As of November 4, the positive test rate for Ottawa County was 16.8 percent.³⁴ It is not possible for me to know if these numbers described above represent an increase in the number of infections, a reflection of more widespread testing or better reporting. However, it is sufficient to establish that there is no seen improvement in COVID conditions and that there continues to be spread of COVID, factors which lead me to conclude there is too much risk to holding a manual election at this time or in the near future. In addition, these numbers far exceed a 14-day testing positivity rate of 5 percent as well as show a 14-day trend of increasing new confirmed cases; both of which meet the second situation enunciated by the Board in *Aspirus Keweenaw*, supra., in determining that a mail ballot election is appropriate in these circumstances.

In addition to the foregoing, the United States Center for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person and that a person may become infected "when **a person who has COVID-19 coughs, sneezes, sings, talks, or breathes**" or by "**touching the surface or object that has the virus on it** and then touching their own mouth, nose, or eyes."³⁵ The CDC also warns: "**It is important to realize that you can be infected and spread the virus but feel well and have no symptoms**" (emphasis in original).³⁶ Guidance issued by the CDC recommends limiting in-person visits to stores as well as in-person contact for deliveries whenever possible.³⁷ Notably, the Oklahoma OURS Plan advises that retail and other essential businesses and organization should follow general CDC

²⁹ <https://sapulpatimes.com/covid-19-hospitalizations-in-oklahoma-could-triple-by-the-end-of-december/> (November 4).

³⁰ <https://covid19.healthdata.org/united-states-of-america/oklahoma?view=total-deaths&tab=trend> (accessed November 10).

³¹ <https://usafacts.org/visualizations/coronavirus-covid-19-spread-map/state/oklahoma/county/ottawa-county> (accessed November 10).

³² *Id.*

³³ *Id.*

³⁴ https://covidactnow.org/us/oklahoma-ok/county/ottawa_county?s=1306315

³⁵ "Frequently Asked Questions," CDC. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed November 5).

³⁶ "Overview of Testing for SARS-CoV-2 (COVID-19)" (updated September 18, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (accessed November 5).

³⁷ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed November 5).

guidelines.³⁸ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”³⁹

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its “Polling Locations and Voters – Recommendations for Election Officials and Poll Workers” guidance states that officials should consider offering alternatives to in-person voting if allowed...to **minimize direct contact and reduce crowd size at polling locations...** (emphasis in original).⁴⁰ The CDC further states in this section that “[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.” Although this election would not likely involve significant travel to the facility⁴¹ by a Board Agent⁴² and party representatives, nevertheless the CDC continues to maintain that “[b]ecause travel increases your chances of getting infected and spreading COVID-19...[s]taying home is the best way to protect yourself and others from COVID-19.” (emphasis in original).⁴³ At this time, sending a Board agent and party representatives to conduct the election in person would risk the exposure of everyone at the facility. Voters, along with other employees who may come into contact with each other, Board agents, and party representatives, would risk being exposed to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote. Furthermore, a mail ballot election avoids the uncertainties created by COVID-19. For example, it is now well-established, although the exact percentage is uncertain, that certain individuals infected with COVID-19 will remain asymptomatic and display no symptoms. It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms. As a result, despite the proposed screening measures, infected individuals could participate in the election, unknowingly exposing co-workers, party representatives, observers, and the Board Agent, who, along with the observers, will be in the voting area for a sustained period of time. A mail ballot election eliminates this risk.

Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer’s facility. The Board Agent, observers and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. Board Agents and observers must be present in the same space for the duration of the election period. Given the availability of a mail ballot election, ordering a manual election under the current

³⁸ <https://www.okcommerce.gov/covid19/ours-plan/> (accessed November 5).

³⁹ *Id.*

⁴⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (updated October 29) (accessed November 5).

⁴¹ Though based on the Employer’s proposal to conduct an early morning polling session would necessitate an overnight stay for the Board agent and possibly the party representatives.

⁴² The Fairland facility is approximately 82 miles from the Tulsa, OK resident office from which the Board agent conducting an election would travel from.

⁴³ U.S. Center for Disease Control and Prevention, Coronavirus in the United States- Considerations for Travelers available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed November 5).

circumstances would be in direct contradiction to the federal, state and local guidance, all of which advise avoiding in-person contact if possible, which a manual election necessitates. Mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

Acknowledging the inherent risks and effect of mail delivery procedures on the outcome of a mail ballot election, as noted by the Employer,⁴⁴ there is no indication that the United States Postal Service (USPS) is unable to deliver mail. There is no evidence that the mail service in Kansas, the state in which the mail ballots will be sent and received,⁴⁵ has been disrupted. Further, I note that any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate.⁴⁶ Additionally, the return date for mail ballots could be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there is no absentee ballot or remote voting options under the Board's manual election rules. I find that a mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status while protecting the safety and health of employees at the Employer's facility, comporting with the Employer's noted "interest of having the greatest percentage of employees' voices heard." Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election "at the earliest date practicable" consistent with the Board's Rules and Regulations Section 102.67(b) to insure the fair and free choice of bargaining representatives by employees.

In asserting that a manual election would be safe under the circumstances and pose minimal risks to all individuals present, the Employer proposes few and vague safety measures to mitigate COVID-19 limited to "sanitation procedures in place ensuring the safety of all personnel at its Fairland location;" cleaning/sanitization of election site 24 hours prior to the

⁴⁴ Citing *Premier Utility Services, LLC*, 363 NLRB No. 159 (2016), the Employer argues that the Board has recognized that the USPS can be unreliable in returning completed mail ballots prior to ballot counts. In this case, the Board found that the Regional Director did not err by refusing to count ballots received after the mail ballot count. The Board noted that its concern about the USPS's late delivery of mail ballots after the ballot count must be balanced against "strong policy considerations favoring prompt completion of representation proceedings." *Id.*, slip op. at 1, fn.1 (other citations omitted).

⁴⁵ The ballots will be sent and received from the Region 14 sub-regional office in Overland Park, Kansas.

⁴⁶ I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure and there is no contention that the addresses of the eligible employees are not known or up to date. See, *San Diego Gas*, 325 NLRB at 1145 (in exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources).

voting period; providing “ample space”⁴⁷ at the voting site “to keep voting booths more than six feet apart;” and releasing voters gradually to vote in order to accommodate social distancing. The Employer also states that no employees or visitors at the Fairland facility have tested positive for coronavirus since July. However, the record is silent as to additional safeguards that could be considered in determining the risks posed in this election such as whether the Employer regularly requires daily employee temperature checks and other screening procedures for COVID-19 symptoms; imposition of preventative quarantines for exposed employees; whether the voting areas are capable of providing separate entrance and exit ways; provision of shielded and socially distanced tables for Board Agent, observers, voting booth and ballot box at each voting area; implementation of mandatory mask-wearing with masks, gloves, hand sanitizer and wipes available on-site and throughout the voting area; limitation on number of attendees at pre-election conference and ballot count; limitation on number of voting participants in the polling area to one at a time with contactless interactions between voters and Board Agents and observers. I have carefully considered the Employer’s suggestions and the suggestions in GC 20-10. I note that GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation. A mail-ballot election avoids these concerns. Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within the state.

For the above reasons, I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote promptly.

CONCLUSION

For the reasons stated above, I have concluded that the helpers are eligible to vote as the Employer has not met its burden of establishing that its planned changes in the petitioned-for unit warrant their exclusion. I have also concluded that the helpers share a sufficient community of interest with the other petitioned-for employees to constitute an appropriate voting group. I further conclude that under the extraordinary circumstances described above, the election will be held by mail ballot.

Therefore, based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

⁴⁷ While the Employer’s “polling place specifications” show areas at its facility consisting of 132, 228, 441, and 528 square feet, the Employer has not stated and I am unable to tell whether these areas are capable of providing separate entrance and exit ways.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴⁸

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act (the Unit):

Included: All full-time and regular part-time drivers, laborer/helpers and mechanics employed at and out of the Employer's Fairland, Oklahoma facility.

Excluded: All professional employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Teamsters General Drivers & Helpers Local 823**.

A. ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Monday, November 30, 2020**, by personnel of the National Labor Relations Board, Region 14, from the office of the National Labor Relations Board, Subregion 17 – 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, December 7, 2020, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 Office at (913) 275-6525.

The ballots will be commingled and counted by the Subregion 17 office at 2:00 p.m. CDT on **Monday, December 21, 2020**. In order to be valid and counted, the returned ballots

⁴⁸ The parties stipulated that the Employer, an Oklahoma corporation with a place of business located in Fairland, Oklahoma, is engaged in the business of providing sanitation services. Within the last 12 months, a representative period, the Employer provided services valued in excess of \$50,000 in states other than the State of Oklahoma.

must be received by the Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be held by videoconference. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the weekly payroll period ending November 8, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. VOTER LIST

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Thursday, November 19, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by

using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. POSTING OF NOTICES OF ELECTION

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue following this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the

request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at St. Louis, Missouri, this 17th day of November 2020.



William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
St. Louis, Missouri 63103-2829